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REPORT (1999) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL

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A. INTRODUCTION

In December 1998, the General Council decided that the Working Group, which had been established pursuant to paragraph 20 of the Singapore Ministerial Declaration¹, should continue its work in 1999. The terms of the General Council's decision (WT/GC/M/32, page 52) read as follows:

The General Council decides that the Working Group on the Interaction between Trade and Competition Policy shall continue the educative work that it has been undertaking pursuant to paragraph 20 of the Singapore Ministerial Declaration. In the light of the limited number of meetings that the Group will be able to hold in 1999, the Working Group, while continuing at each meeting to base its work on the study of issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, would benefit from a focused discussion on: (i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (ii) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade. The Working Group will continue to ensure that the development dimension and the relationship with investment are fully taken into account. It is understood that this decision is without prejudice to any future decision that might be taken by the General Council, including in the context of its existing work programme.

This report provides an overview of the work done by the Working Group in 1999, pursuant to the General Council's decision. It constitutes a complement to the Working Group's previous report on its activities in 1997 and 1998 (WT/WGTCP/2).

The report is organized as follows. Part B provides a procedural summary of the Group's activities in 1999. Part C provides an overview of the substantive work done in the Group during the year, pursuant to the General Council's decision.

B. PROCEDURAL INFORMATION ON THE GROUP'S ACTIVITIES

(a) *Sources and materials used in the Group's work*

As was the case in 1997 and 1998, the work of the Working Group in 1999 has been based on written contributions by Members and on oral statements, questions and answers by Members in the Group. This material has been supplemented by information received from observer intergovernmental organizations (see subsection (c) below) and notes prepared by the Secretariat. A tabular summary of written contributions to the Group in 1999 is attached as Annex 2.

(b) *Meetings held in 1999*

The Working Group held three formal meetings in 1999. The dates of the meetings were: 19-20 April, 10-11 June and 14 September. The dates of these meetings were determined in the light of the instruction in paragraph 22 of the Singapore Ministerial Declaration that careful attention be given to coordinating meetings of the Working Groups established under paragraphs 20 and 21 with those of relevant UNCTAD bodies. At the meetings in April and June, consideration was given to the full range of topics called for in the decision of the General Council referred to above. The principal purpose of the meeting held on 14 September was to review and adopt the Working Group's Report (1999) to the General Council. Reports on these meetings have been circulated in documents WT/WGTCP/M/8, 9 and 10.

¹ The text of paragraph 20 is reproduced in Annex 1.

(c) *Cooperation with other intergovernmental organizations*

The Singapore Ministerial Declaration (paragraph 20) encouraged the Working Group to undertake its work in cooperation with UNCTAD and other appropriate intergovernmental fora, to make the best use of available resources and to ensure that the development dimension was taken fully into account. In this regard, the IMF and the World Bank have continued to attend the Working Group's meetings in an observer capacity, pursuant to the cooperation agreements concluded between the WTO and these organizations. UNCTAD and the OECD also attended the meetings as observers, on the basis of an invitation from the Working Group. In the course of the Group's meetings, they have kept the Group updated on relevant activities of their organizations and contributed to the debate. The Working Group is highly appreciative of the valuable contributions to its work made by the observers.

As a further aspect of cooperation, a third symposium, organized by the WTO Secretariat jointly with UNCTAD and the World Bank, was held on 17 April 1999 in the Centre William Rappard. The subject of the Symposium was Competition Policy and the Multilateral Trading System: the Relevance of Fundamental WTO Principles, International Cooperation and the Contribution of Competition Policy to WTO Objectives. A fourth Symposium, organized by the WTO Secretariat with financial support from, and participation by staff of the Secretariats of, UNCTAD and the World Bank, took place on 13 September 1999 at the WTO. The subject of this Symposium was Competition Policy and the Multilateral Trading System: A Dialogue with Civil Society. Although formally separate from the work programme of the Working Group, these events were aimed at facilitating its work.

C. SUBSTANTIVE WORK DONE IN THE GROUP IN 1999

This section of the report provides an overview of the substantive work done in the Group, pursuant to the General Council's Decision in December 1998 (WT/GC/M/32, page 52). By its very nature, such an overview cannot reflect everything that was said and capture all nuances of the discussion, such as can be found in the detailed records of the two meetings of the Working Group (WT/WGTCP/M/8 and 9) and in the written contributions of Members (see Annex 2).

The section is organized in accordance with the way in which the Group structured its discussion of the issues, on the basis of the General Council's decision calling for the work to be done. It will be noted that the discussion which took place on a number of issues cut across more than one of the sub-headings used below. This means that, in order to have a full appreciation of the discussion that took place on these issues, it may be necessary to refer to more than one subsection of this Part of the report. It also means that some degree of repetition has been unavoidable in the preparation of the various subsections.

I. THE RELEVANCE OF FUNDAMENTAL WTO PRINCIPLES OF NATIONAL TREATMENT, TRANSPARENCY AND MOST-FAVOURED-NATION TREATMENT TO COMPETITION POLICY AND VICE VERSA

The matter of the relevance of fundamental WTO principles of national treatment, transparency and most-favoured-nation treatment to competition policy and vice versa was discussed by the Working Group at its meetings on 19-20 April and 10-11 June 1999. Written submissions on this item were provided by the representatives of the European Community and its member States, Switzerland, Japan (two contributions), the United States and Turkey (documents W/115, W/117, W/119, W/120 and W/131, respectively).² Turkey provided a non-paper. Australia; Brazil; Canada; the Czech Republic; the Dominican Republic; Egypt; the European Community and its member States; Hong Kong, China; India; Japan; Korea; Malaysia; Norway; Switzerland; and the United States; and observers from Croatia and the Russian Federation provided oral comments or posed questions on this item. In addition, the Group had before it two background notes prepared by the Secretariat, one dealing with the fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency (W/114) and the other on the Fundamental Principles of Competition Policy (W/127).

A major component of the discussion concerned the content and application of the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency and their significance for competition policy. The point was made that the importance of these principles was greater than ever in the current era of the globalization of world trade. It was suggested that they provided a basis for achieving the aims of competition policies and also for effective international cooperation in this field.³ The view was also expressed that adherence to the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency was important for the sound application of competition law and for maintaining the effectiveness, impartiality and credibility of such law⁴; in fact, it would not be possible to conceive of a sound national competition policy without much attention being paid to these principles.⁵ It was also suggested that the principles of national treatment and most-favoured-nation treatment, on the one hand, and transparency, on the other hand, were extensively intertwined, in that if a high degree of transparency was maintained, this would make it difficult for a competition agency to discriminate in any consistent way over any length of time, since, if it did, this would become publicly known, and it would not be a sustainable position.⁶

The point was made that, under GATT/WTO jurisprudence, a core objective of the principles of national treatment and most-favoured-nation treatment was to promote the equality of competitive opportunities for Members and their respective goods, services and enterprises.⁷ Moreover, these principles were applicable in respect of both de jure and de facto discrimination. They sought the avoidance of distortions in the competitive process, not the guarantee of specific results in terms of market access.⁸ In the light of this, it was said that there was an intrinsic relationship between competition policy and the principles of national treatment and most-favoured-nation treatment, in that competition policy provided a tool to address certain kinds of discriminatory policies and arrangements which denied equal competitive opportunities to foreign competitors.⁹ The view was also expressed that the importance of the principles of national treatment and most-favoured-nation treatment in the area of competition policy reflected a basic tenet of such policy which was that it

² In this Part of the report, documents issued in the series WT/WGTCP/W/- are referred to as "W/...". Documents issued in the series WT/WGTCP/M/- are referred to as "M/..."

³ M/9, paragraph 19.

⁴ M/8, paragraphs 3, 8, 11, 14, 15, 16, 18, 21, 22 and 24; M/9, paragraphs 3, 4, 6, 9, 10, 11 and 19.

⁵ M/8, paragraph 15.

⁶ M/8, paragraph 24.

⁷ M/8, paragraph 3.

⁸ M/8, paragraphs 3, 8 and 11.

⁹ M/8, paragraphs 3 and 8.

protected competition rather than individual competitors.¹⁰ The nationality of individual competitors was irrelevant in this regard.¹¹

The view was expressed that the principle of transparency was critical to ensuring the fair application of national laws and policies, including those implementing Members' WTO obligations, in demonstrating and promoting a Member's compliance with those obligations to other Members, and in reinforcing support by the public at large for relevant laws and policies and for the operation and objectives of the multilateral trading system.¹² The view was expressed that this was both a general principle and a principle that acquired special aspects when applied to specific types of measures dealt with in the WTO framework. It had at least three dimensions: first, publication; second, uniform, impartial and reasonable administration of measures that had an impact on trade; and third, the rights of parties to legal proceedings that might lead to the adoption of measures that had an impact on trade, for example the right to be heard, and that needed to be recognized under domestic legislation. Further, it was suggested that transparency in the application of competition law and policy fostered confidence in an economy and increased its attractiveness as a location for investment.¹³ It was also stressed that, as under the rules of the WTO, an important qualification concerning the principle of transparency in competition law enforcement was the provision of appropriate safeguards for the protection of confidential information; this was vital to maintaining confidence in the administration of justice, and therefore to public support for the law.¹⁴

A number of points were made regarding the extent to which the WTO rules embodying the fundamental principles of national treatment, most-favoured-nation treatment and transparency were already applicable in the field of competition law and policy. The view was expressed that these principles applied only in respect of government measures and not in regard to private practices, or even hybrid practices, as had been amply demonstrated in the recent Fuji/Kodak matter.¹⁵ A number of examples were cited of anti-competitive practices which could have restrictive or discriminatory effects, and which would not be reached by existing WTO instruments. These included, inter alia, collective boycotts, exclusionary actions by professional associations, abuses of a dominant position which were intended to prevent the entry of new competitors, price-fixing cartels, export and import cartels, and market-sharing arrangements.¹⁶ The view was also expressed that effective application of the principles of national treatment, most-favoured-nation treatment and transparency in the sphere of competition policy depended on the existence and active enforcement of a well-constituted national competition law. In cases where no such legislation existed or it was not effectively applied, or where competition rules were applied through sector-specific legislation or where there were exceptions, exclusions and derogations from the competition laws, the relevance of the fundamental WTO principles to competition rules was unclear.¹⁷ The view was also expressed that Articles VIII and IX of the GATS, which addressed monopolies and restrictive business practices in the services sector, might be able to address private barriers to the market that could not be handled, at least not with sufficient efficiency, within the GATT itself.¹⁸ This reflected the fact that trade in goods was extensively intertwined with distribution services. Distribution services that were within the regime of the GATS included agency agreements, distribution agreements and franchising agreements. It was said, further, that the impact of the ideas that had been put forward for multilateral rules should be examined with reference to the services sector, given the limited coverage of the GATS with regard to competition and the concept of progressivity of commitments as had been floated in the discussion. Attention was drawn to the approach that had been followed in the telecom negotiations, i.e., a

¹⁰ M/9, paragraph 13.

¹¹ M/9, paragraphs 3 and 13; M/8, paragraphs 8 and 18.

¹² M/8, paragraphs 15, 18 and 24.

¹³ M/8, paragraph 13.

¹⁴ M/8, paragraphs 4, 7 and 13.

¹⁵ M/8, paragraph 7; M/9, paragraphs 9 and 11.

¹⁶ M/8, paragraph 6 and M/9, paragraph 9.

¹⁷ M/8, paragraph 7; M/9, paragraph 4.

¹⁸ M/8, paragraph 26.

deadline had been set and gradual implementation provided for.¹⁹ Another view was that the basic WTO principles were indeed already applicable to competition law and policy, to the extent that they affected trade, by virtue of Article XVI:4 of the Marrakesh Agreement.²⁰

The view was expressed that effective application of the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency in the field of competition policy would require the adaptation of the principles to the particular subject-matter. Adaptation of these principles had already proved necessary in the case of services and trade-related intellectual property rights, in the GATS and the TRIPS Agreement, respectively. In this regard, it was suggested that the Group look together into the development of common principles relating to the adoption and enforcement of competition law. Such an exercise would not be aimed at the harmonization of competition laws, as there were many reasons why competition laws had to be different in individual countries. Rather, what would be desirable would be to define the elements relating to transparency and non-discrimination that were common to most jurisdictions and were most important for the international trading system.²¹

The view was also expressed that, in many, if not most, jurisdictions having competition laws, the content and application of such laws were already generally consistent with the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency.²² Some Members affirmed this as regards their own competition laws and policies.²³ In this connection, the point was made that this should not be understood to mean that differential treatment of arrangements or firms, including between foreign and domestic firms, could not arise in some cases, but that such differentiation would be attributable not to differences in nationality, but rather to factors such as differences in the degree of culpability among parties in a particular case, the differing evidence available with respect to such parties, or differences in the nature and extent of their cooperation in the investigative context.²⁴ In the light of this, the view was expressed that the assessment that most countries' competition laws and policies were consistent with basic WTO principles demonstrated that, from a WTO standpoint, matters were fine as they stood and no action was needed at the multilateral level in this regard.²⁵

In response to this view, it was suggested that, if consideration was being given to certain commitments at the multilateral level, it was not solely a question of determining whether existing national laws or the laws of other countries created a problem in terms of those commitments. Rather, the starting-point should be a consideration of whether competition law was relevant for the trading system. On this point, the discussions that had taken place in the Group thus far had shown clearly that there was a very large degree of agreement that the effective application of competition law complemented and reinforced the process of trade liberalization.²⁶

The point was made that the interaction between trade and competition policy was bi-directional as was this item of the Group's work programme due to its "vice versa" element.²⁷ Therefore, in addition to the implications of fundamental WTO principles for competition policy, it was important to give due consideration to the matter of how the principles of competition law and policy could contribute to international trade. Further to this suggestion, the Group, at its meeting on 10-11 June, had before it a Note by the Secretariat on the Fundamental Principles of Competition Policy (W/127). It was said

¹⁹ M/8, paragraph 27.

²⁰ M/9, paragraph 15.

²¹ M/8, paragraphs 3, 4 and 7.

²² M/8, paragraphs 4, 8, 18 and 24; M/9, paragraphs 3, 4, 6, 9 and 14.

²³ M/8, paragraphs 4, 8, 15, 16 and 24; M/9, paragraphs 3, 4 and 9.

²⁴ M/9, paragraph 3.

²⁵ M/9, paragraph 12; see also M/8, paragraphs 17, 19, 24, 33 and M/8, paragraph 15.

²⁶ M/9, paragraph 16.

²⁷ M/8, paragraph 11.

that the categorization and explanation of principles that had been set out in this Note were helpful.²⁸ The suggestion was also made that it might have been preferable to make a clearer distinction in the note between the objectives of competition policy and its operational principles.²⁹ Thus, the objectives of competition policy would be limited to achieving economic efficiency, consumer welfare and economic development, whereby the maintenance of competition is not a goal in itself but a means to achieve those objectives. The point was made that the relevance of the fundamental principles of competition policy to trade policy concerns had been clearly established in the initial meetings of the Group.³⁰ It was said, further, that such principles could contribute to secure market access and provide predictability in markets; and that establishment of an orderly relationship between these principles and those of the multilateral trading system would contribute importantly to the core objectives of both competition policy and the WTO, namely efficiency, consumer welfare and economic development.³¹

Particular emphasis was placed by some Members on the principle, noted in paragraph 34 of the Note by the Secretariat on the Fundamental Principles of Competition Policy, that competition policy protects competition and not competitors. The point that this implied that nationality was irrelevant in well-constituted competition policies was recalled.³²

Reference was made to a "competition-oriented principle" as being a concept that placed maximum emphasis on the market mechanism. It was suggested that this concept was of direct relevance to the WTO, whose primary objective was the optimal use of resources at a global level through the reduction of tariffs and other trade barriers. When considering the "competition-oriented principle" in the context of WTO competition disciplines, it was suggested that four implications could be identified. The first was that the basic philosophy of a pro-active response to anti-competitive practices would be assured. The second was to extend the prevention of anti-competitive practice across all sectors. The third was to minimize sectors or areas exempted from national competition laws. The fourth was to introduce the competition policy perspective into government regulations and industries.³³

With regard to the further elaboration of the fundamental principles of competition policy, the suggestion was made that, in order to ensure that the principles identified were capable of wide application, core competition principles should first be agreed upon and then second-level principles aimed at underpinning these core principles should be identified. In doing so, the Group should guard against narrow, prescriptive rules with limited applicability. The view was expressed that the work under way in the context of APEC would be helpful in this regard.³⁴

²⁸ M/9, paragraphs 7 and 13. The first category of principles set out in the Note by the Secretariat concerned principles in the sense of the overriding goals or objectives of competition policy - for example the promotion of economic efficiency, the promotion of consumer welfare and economic development. These objectives served as important guide-posts for officials in applying diverse aspects of related laws and policies. The second category of principles consisted of operational principles of policy design and application. Examples of principles in this category included the promotion of market-opening measures, the identification of situations in which market power was likely to be exercised, and the distinction that was made in virtually all competition law systems between arrangements that were primarily horizontal in nature and those that were primarily vertical in nature. The third category of principles related to the institutions and processes through which competition policy was applied. Examples of principles in this category included adherence to due process in the application of competition law and policy, optimizing the scope of competition policy and ensuring coherence between competition policy and direct economic regulation, adherence to the fundamental WTO principles of non-discrimination and transparency, and international cooperation to the extent permitted by national laws.

²⁹ M/9, paragraph 13.

³⁰ M/9, paragraph 9.

³¹ M/9, paragraph 13.

³² M/9, paragraphs 3 and 13.

³³ M/8, paragraph 9.

³⁴ M/9, paragraph 7.

The Group was informed that, at the APEC Competition Policy and Deregulation Workshop in Christchurch on 30 April and 1 May it had been agreed to develop a set of APEC competition and regulatory principles. Subsequent work had developed and refined the principles with the end result being the *APEC Principles to Enhance Competition and Regulatory Reform* which were endorsed by APEC Ministers and Leaders in September 1999. Four core principles (non-discrimination, comprehensiveness, transparency and accountability) and a set of action-oriented undertakings had been endorsed, in this regard. The aim of these non-binding principles was to provide a basis for policy development rather than a stringent set of specific rules. It was suggested that these principles would assist in the process of introducing competitive markets within Member economies and recognized the diverse circumstances of Member economies that sought to implement them.³⁵

The view was expressed that the discussions which had taken place in the Working Group over two years of discussion had shown clearly that anti-competitive practices could, under certain circumstances, reduce market access and distort trade.³⁶ In order to deal effectively with these barriers to international trade, it was necessary to develop rules.³⁷ The report which the Working Group had adopted in December 1998 (WT/WGTCP/2) provided explicit documentation of these problems. It was also suggested that a number of WTO instruments, including the GATS in general, Article 40 of the TRIPS Agreement and the results of the basic telecom negotiations, all suggested that competition enhancement was an important aspect of trade liberalization.³⁸ In the light of this, the question was raised as to whether such rules had to be implemented by countries purely at the domestic level, or whether such rules and the development of related institutions could usefully be reinforced through common commitments and understandings.³⁹

The suggestion was made that three possible approaches could be considered for addressing anti-competitive practices that impacted adversely on international trade. First, Members could attempt to eliminate these practices by making use of national trade and competition legislation to the maximum extent. This could be referred to as the unilateral approach. The second possible approach was the bilateral approach, which would involve greater use of cooperation arrangements. Both the unilateral and bilateral approaches had their own problems. In the case of the unilateral approach, this often resulted in jurisdictional disputes or frictions as a result of the unilateral enforcement of competition law by one State. The bilateral approach also had significant institutional constraints. Bilateral arrangements tended to be established only between countries with plenty of experience in competition policy. In the light of these considerations, the suggestion was made that the Group consider the possibility of introducing a further approach, namely a multilateral framework on competition.⁴⁰

Various suggestions for action by the WTO were presented as based on strengthening the application of the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency in the field of competition law and policy, including in regard to anti-competitive practices of enterprises that impacted adversely on international trade.⁴¹ Although differing in some respects, including the degree of detail in which they were set out, these suggestions envisioned defining specific elements of competition law and policy relating to the fundamental WTO principles which were common to most jurisdictions having such laws/policies and which were considered to be important for the multilateral trading system.⁴²

³⁵ M/10, paragraph 6.

³⁶ M/9, paragraph 9.

³⁷ M/9, paragraphs 9 and 17.

³⁸ M/9, paragraph 17.

³⁹ M/9, paragraph 16.

⁴⁰ M/8, paragraph 10.

⁴¹ M/8, paragraphs 4, 5, 7, 8, 10, 11, 15, 16, 18; M/9, paragraph 10. To some extent, this discussion of possible approaches to a framework agreement overlapped with discussions that took place in relation to other aspects of the Group's work. See, in this regard, Parts C(II) and (III), below.

⁴² M/8, paragraphs 4, 5, 7, 8, 10, 11, 15, 16 and 18; M/9, paragraphs 4, 9 and 10.

One view was that the following elements were relevant to the nexus between WTO principles and competition law and policy.⁴³ In regard to the existence and scope of application of competition legislation, it was suggested that such legislation should cover, at least, the following types of anti-competitive practices, as these were the practices that had the most significance for international trade: anti-competitive horizontal restraints, vertical restraints and abuses of a dominant position that had a negative impact on competition. With regard to the matter of mergers, it was suggested that the issue to be discussed was not so much whether individual countries should have legislation to control mergers, but rather, where there was such legislation, how it could be applied in a transparent and non-discriminatory manner and what the requirements were in terms of international cooperation to guarantee this. Another important issue was the matter of exclusions from the application of competition law and policy. Clearly, exclusions could contribute to discriminatory practices and it was vital to restrict such exclusions to a minimum, for the sake of both non-discrimination and transparency. Another specific matter was that of export cartels which resulted in discrimination between the domestic and the export market and, as such, could have a negative effect on other WTO Members. It was suggested that the correct approach to dealing with this issue would be based on the principle of cooperation, since there were jurisdictional limits to the solution of the problem solely through the application of competition legislation in the exporting country. An additional matter related to the application of competition policy. Under this rubric, reference was made to measures to promote the progressive development of institutional capacities, including through enhanced international cooperation with developing countries, the existence of effective and transparent enforcement powers and the appropriate protection of confidential information. In addition, measures could be developed to support the competition advocacy role of competition authorities. It was said that these elements could contribute importantly to promoting the equality of competitive opportunities.⁴⁴

Another suggestion was that the Group could consider developing a principle that would call for no less favourable treatment in terms of competition rights for citizens or firms of foreign countries than that accorded to firms or nationals of the host country. This could mean that national competition legislation could be applied to anti-competitive behaviour that took place outside a country's borders, on the basis of minimum standards or principles which would be agreed through negotiations, for example on the treatment of hard-core cartels, cooperation to deal with export cartels or an agreed set of factors to be considered in the treatment of vertical market restraints. From a procedural standpoint, it could also involve the granting of no less favourable treatment to a foreign product or company in the exercise of their rights in legal or administrative proceedings in the field of competition law and policy. The national treatment provision would apply in respect of any existing legislative provisions. To give the principle more practical application in this field, its application could be based on substantive minimum standards or principles to be adopted at the multilateral level. Matters that could be addressed in this regard would include the prohibition of hard-core cartels, the treatment of export cartels and an agreed set of factors to be considered in the treatment of vertical market restraints.⁴⁵

With regard to the principle of transparency, three further considerations were said to be relevant.⁴⁶ First, it was important to ensure transparency as regards the legal framework, including both the law itself and any related guidelines or administrative regulations. Second, transparency needed to be ensured in the enforcement process. With regard to this aspect, it was also essential to ensure due protection of confidential information. Third, it was important to ensure due process in the enforcement of the law. This had at least two aspects: first, the possibility for private firms to have access to domestic competition law systems, whether through complaints presented to the competition authorities or through the judicial system. Second, it was important to ensure fair treatment of parties in the application of the law. The view was also expressed that adaptation of the principle of

⁴³ M/8, paragraph 4 and M/9, paragraph 10.

⁴⁴ M/9, paragraph 10.

⁴⁵ M/8, paragraph 7; see also M/9, paragraph 9.

⁴⁶ M/9, paragraph 10.

transparency to the field of competition policy could involve, for example, requiring publication of decisions relating to anti-competitive practices such as cartels, horizontal agreements, vertical restrictions, abuses of a dominant position and mergers. In framing any new provisions to enhance transparency, a key consideration would be to maintain appropriate safeguards for the protection of confidential information whose disclosure would be prejudicial to the interests of private companies.⁴⁷

The view was expressed that an important feature of any multilateral framework in the area of competition law and policy would be its adaptation to the differing levels of development of Members. It was said that four aspects needed to be considered.⁴⁸ First, with regard to the application of the principles to developing countries, it was important to take into consideration their different economic realities and degrees of economic development. This was relevant, for example, to the question of the breadth of exemptions that would be appropriate in particular economies. The second aspect was the different cultural conditions that prevailed in different countries, which were important in view of the far-reaching social and economic changes that the introduction of competition policy could entail. The third aspect had to do with differences in resource endowments in the sense that certain applications of competition policy required more human and material resources. Again, differences in levels of development had to be taken into account. The fourth aspect concerned the different degrees of institutional development that were present in Member countries. In particular, it had to be recognized that the more than 80 countries having, or in the process of introducing, competition laws were at many different stages in their institutional development.⁴⁹ Recognition of the development dimension in any agreement on competition policy should include, but not be limited to, matters such as transition periods, progressivity of commitments and technical cooperation.⁵⁰

A number of objections were raised and questions posed in response to the various suggestions that had been put forward. The view was reiterated that in many, if not most, jurisdictions having competition laws, the content and administration of such laws was already broadly consistent with fundamental WTO principles and, consequently, no action was called for by the WTO.⁵¹ In addition, the view was expressed that a competition law was not strictly necessary to ensure effective application of fundamental WTO principles in the area of competition policy. In this regard, reference was made to the examples of Singapore and Hong Kong, China which, it was suggested, had been regarded, for years, as being among the most, or perhaps the most, competitive markets in the world, despite the fact that neither of these countries had a comprehensive competition law.⁵² Furthermore, it was said that the proposal for a requirement for a comprehensive competition law did not take into account the diversity of legal systems and the state of development of individual WTO Members.⁵³ For example, it was not clear why a sectoral approach could not work equally as well as a comprehensive competition law approach, at least for some economies.⁵⁴

In response, the point was made that no-one had called into question the fact that there were many other policies which could contribute to promoting competition and enhancing economic welfare. However, as had been discussed extensively in the Group, there was plenty of evidence that a competition law still had an important role to play from the perspectives of development and international trade. On the question of sectoral policies, while it could well be that, in some cases, competition policy considerations might also have to be discussed at the sectoral level, the question of the interaction between trade and competition policy in general was something that had to be considered with reference to all sectors of the economy. The view was also expressed that competition policy was now a global phenomenon. It was something that affected countries at all

⁴⁷ M/8, paragraph 7.

⁴⁸ M/8, paragraph 15.

⁴⁹ M/8, paragraphs 15, 21, 25 and 30.

⁵⁰ M/8, paragraph 30.

⁵¹ M/8, paragraph 17; M/9, paragraph 12

⁵² M/8, paragraph 19.

⁵³ M/8, paragraphs 19 and 23.

⁵⁴ M/8, paragraph 19.

stages of development and something on which there would, therefore, be benefits from working together at the multilateral level.⁵⁵

The question was posed as to whether the suggestions that had been made by some delegations were intended to apply only in the international or also in the domestic context. In this regard, it was said that if, as appeared to be the case, they emphasized the international sphere of application, this would not address many of the most pressing competition problems facing developing market economies.⁵⁶ In response, the point was made that the reason why the matter of competition law and policy was being discussed in the WTO was precisely because anti-competitive practices could have a significant impact on international trade, and that the type of rules that would be the focus of discussions in the WTO would be those dealing with practices that had an impact on trade. However, when it came to the adoption and implementation of relevant elements of competition law, one would not imagine that a country would introduce a rule which applied only to those anti-competitive practices which had an impact on international trade.⁵⁷

The points were also made that only some 70 countries had competition laws, that a number of developing countries were still considering the possibility of enacting competition laws, that even amongst countries having such legislation, there was a high degree of disparity in the scope and level of national competition regimes which would reduce room for consensus on any possible multilateral disciplines, and that a multilateral framework on competition in the WTO could put constraints on national sovereignty and create difficulties in achieving the necessary balance between competition policy and other economic policies and might also restrict the powers of competition authorities.⁵⁸ The view was expressed, further, that the proposals that had been outlined were inconsistent with the culture of the WTO. In the WTO, the requirement was for individual Members to ensure that their laws, regulations and restrictive procedures, etc., were in conformity with the rights and obligations in the relevant Agreements. For example, the Anti-Dumping Agreement prescribed the principles and steps and the requirements for individual Members who had or who wished to introduce anti-dumping legislation, but it did not require individual Members to introduce anti-dumping legislation. Subject to this, it was up to individual Members to see whether and how they should put the rights and obligations into effect in their own domestic legislative or administrative processes. Some of the Agreements did not require any legislative means whatsoever.⁵⁹

The view was expressed that three alternative approaches to a mandatory requirement for competition legislation could be envisioned. The first one was a sectoral approach. It was not clear why a sectoral approach could not work equally as well as a comprehensive competition law approach. The second alternative was a multilateral framework that did not specify or require individual Members to introduce any comprehensive competition law, but merely prescribed principles to be followed if a Member wanted to introduce competition law. The third alternative would be a plurilateral framework, like the existing Agreement on Government Procurement.⁶⁰

With regard to the point that only about 70 countries had competition laws, it was said that this was a considerable improvement over the situation prevailing at the time of the drafting of the so-called Havana Charter almost 50 years ago, when only a few countries had competition laws. This had gone a long way towards establishing a common background among WTO Members in this area, which would facilitate the development of an effective multilateral framework on competition.⁶¹

A further suggestion that was made to strengthen the application of the principle of transparency concerned the adoption of a system of voluntary notification for countries regarding national

⁵⁵ M/8, paragraph 32.

⁵⁶ M/8, paragraph 17.

⁵⁷ M/8, paragraph 31.

⁵⁸ M/8, paragraphs 22 and 23.

⁵⁹ M/8, paragraph 19.

⁶⁰ M/8, paragraph 19.

⁶¹ M/8, paragraph 10.

competition legislation and regulations. It was said that a system of voluntary country reviews could be a particularly useful tool for sharing and benchmarking different national experiences. Such a system could help to demonstrate the advantages of competition, and show how good competition laws and good enforcement of such laws could help countries to achieve improvements in economic welfare. It was suggested, further, that the publication of world reports on competition on a regular basis would also be a useful activity that could be undertaken by the WTO as an aspect of the educational role that some delegations wished to see it take up in this area.⁶²

The view was expressed that further study was needed of the complex issues posed by the interaction between trade and competition policy before it would be appropriate to commence negotiation of a WTO framework agreement in this area.⁶³ In particular, it was said that the Group was in an exploratory and educative process and was still a long way off from the point where it could be in a position to gauge the need for multilateral rules.⁶⁴

II. APPROACHES TO PROMOTING COOPERATION AND COMMUNICATION AMONG MEMBERS, INCLUDING IN THE FIELD OF TECHNICAL COOPERATION

This item was discussed by the Working Group at its meetings of 19-20 April and 10-11 June 1999. Written submissions on this item were provided by the delegations of the United States; Japan; Korea; Australia; Zimbabwe on behalf of the African Group at the WTO; the European Community and its member States; and Romania (documents W/116, W/121, W/124, W/125, W/126, W/129 and W/132, respectively). In addition, the representatives of Australia; Brazil; Canada; the Czech Republic, Egypt; the European Community and its member States; Hong Kong, China; India; Japan; Korea; Morocco; Peru; Romania; Singapore on behalf of ASEAN WTO Members; Switzerland; and the United States made oral statements or posed questions on this item. Further, the observers from the OECD, the World Bank and UNCTAD provided information on relevant activities of their organizations.

The view was expressed that globalization and falling trade barriers had resulted in a greater need for cooperation and communication between WTO Members, on both the competition and the trade fronts.⁶⁵ While the ultimate objective of cooperation was to protect and promote public welfare, including consumer welfare, from a trade perspective, the purpose of cooperation on competition matters was to ensure that anti-competitive practices did not adversely affect the commercial advantages resulting from elimination of tariff and non-tariff barriers.⁶⁶ Areas of concern mentioned in this regard included anti-competitive conduct by firms in foreign markets, for example vertical market restraints and cartels, in addition to anti-competitive market structures fostered by government action or inaction. The point was made that, while not every market access problem could be attributed to the presence of anti-competitive private practices, or to anti-competitive regulatory structures, where there had been a history of such conduct or structures, cooperation with foreign competition authorities could help to address the problem.⁶⁷ From a competition perspective, cooperation was aimed at improving the coordination of national competition policies.⁶⁸ That is, given the growing interdependence of markets, the enforcement work of competition authorities increasingly was no longer conducted in isolation but rather in a more coordinated fashion in cooperation with foreign competition authorities.⁶⁹

⁶² M/8, paragraph 16.

⁶³ M/8, paragraphs 20 and 25.

⁶⁴ M/8, paragraph 20.

⁶⁵ M/8, paragraph 44.

⁶⁶ M/8, paragraph 68.

⁶⁷ M/8, paragraph 50.

⁶⁸ M/9, paragraph 24.

⁶⁹ M/9, paragraph 29.

The point was made that cooperation could be conducted at a bilateral, a regional or a multilateral level. It was said that bilateral cooperation was the most common form of international cooperation on competition policy.⁷⁰ The simplest form of bilateral cooperation was ad hoc consultations and sharing of public information. This did not require a formal agreement. Competition authorities habitually consulted one another and exchanged publicly available information with respect to a variety of administrative, procedural and policy issues.⁷¹ While such meetings did not specifically address trade problems, they served to improve understanding of the competition laws and policies of trading partners.⁷²

It was noted that a number of Members had signed or were involved in negotiating formal bilateral cooperation agreements amongst themselves.⁷³ These agreements had dual motivations and functions: one was to step up the level of cooperation *per se*; another was to avoid conflicts. The agreements could contain several common types of provisions, including provisions for notification of appropriate authorities of one country about actions to be taken by the national competition authority of another country, where such actions could affect the important interest of the first country; sharing of information and coordination of investigations conducted by both competition authorities; positive comity; and consultations on various issues.⁷⁴

The uses and limitations of positive comity were discussed. This concept involved a situation where the competition agency in country A concluded that there was a reasonable basis to believe that certain anti-competitive practices, causing it harm, also constituted a violation of the competition rules of another country B. In this case, the competition agency of country A would ask the competition agency of country B to undertake an investigation of such practices and take whatever action was appropriate. The point was made that one important benefit of positive comity was that it allowed cases to draw on evidence available in other jurisdictions, although these cases were conducted by a foreign competition authority. It could also serve as a tool for minimizing tensions involving enforcement. The point was made that positive comity tended to be a more useful tool in situations where competition agencies had developed a relationship of mutual trust and confidence, and where the agencies involved respected the principle of national treatment, had adequate investigative and remedial powers, and had a sufficient degree of independence.⁷⁵ There was a risk of inaction, since it was up to the requested country to decide whether to initiate an antitrust investigation on behalf of the complaining country. The requested country might be reluctant to enforce its competition law at the expense of its own domestic industry and primarily for the benefit of the complaining country. Differences in the coverage and application of competition law could further constrain the role of positive comity.⁷⁶ The point was also made that positive comity was unlikely to be an appropriate tool for dealing with an export cartel. In particular, the exporting country would not find it in its interest to combat the export cartel and, even if it did, its legislation might not allow it to take measures against it.⁷⁷

The view was expressed that the provision of technical assistance constituted another important form of cooperation in a bilateral context. Competition agencies with substantial experience helped others engage in the process of implementing a competition regime on issues ranging from drafting new laws and amendments to specific case analysis.⁷⁸ The point was made that the modalities of technical assistance were related to the stage of development of competition law in the recipient country. For instance, local training in the foreign country appeared to be most effective once that country had legislation in place and was actively conducting investigations. Prior to that, for countries at the

⁷⁰ M/8, paragraph 53.

⁷¹ M/8, paragraphs 44, 51 and 53.

⁷² M/8, paragraph 51.

⁷³ M/8, paragraph 45 and M/9, paragraph 29.

⁷⁴ M/8, paragraphs 45 and 46.

⁷⁵ M/8, paragraph 46.

⁷⁶ M/8, paragraph 54.

⁷⁷ M/8, paragraph 72.

⁷⁸ M/8, paragraph 44.

exploratory stage, it was more effective to bring officials to the host country to see legislative and regulatory structures first-hand. Programmes grouping together delegates from different countries tended to be fruitful in terms of exchange of information and experiences, and helped form specialists' networks.⁷⁹ The point was made that the benefits from technical assistance could be mutual. On the one hand, developing countries welcomed technical assistance for setting up their competition regimes because this helped them ensure efficient competition in their markets and the protection of the consumer.⁸⁰ On the other hand, through the provision of technical assistance, competition agencies from developed countries increased their sensitivity to conditions and concerns in other countries.⁸¹

The view was expressed that effectiveness of bilateral cooperation agreements could be constrained by a number of factors, including differences in substantive laws, the degree of independence of competition agencies, whether a competition agency was adequately resourced, and differences in national laws governing the exchange of confidential information.⁸² Another significant constraint was the need to protect confidential information.⁸³ This constraint could be relaxed in two circumstances. First, in certain cases private parties to a proceeding had waived this right, because they recognized that it was in their own interest to facilitate cooperation between the two competition agencies.⁸⁴ Second, some cooperation agreements allowed the sharing of confidential information and thus they did not involve this constraint.⁸⁵ The point was made that a broader limitation to bilateral cooperation, be it informal or formal, was that this type of cooperation tended to take place among countries economically interdependent and sharing a similar level of experience in competition law enforcement⁸⁶, or countries that shared the same ideas in the field of competition policy. Furthermore, bilateral agreements were set up on a case-by-case basis and this approach did not make it possible to take up all the challenges arising from globalization. In this regard, the point was made that, under a bilateral approach, countries affected by competition investigations were consulted only if a bilateral agreement existed with that country. However, it was not feasible to set up a bilateral agreement with every country, since in many cases very few business transactions were involved.⁸⁷

The view was also expressed that bilateral agreements could open the door for abuse, since countries could use such agreements to obtain evidence and information from foreign firms and governments, with a view to enforcing their competition law extraterritorially. This observation was said, however, to be analytical in nature rather than being based on actual experience and not to be a general aspect of the operation of bilateral cooperation agreements.⁸⁸

The view was expressed that regional fora on competition issues could be useful in promoting effective policy development and enforcement. Relevant examples cited included regular meetings on competition matters held by APEC, NAFTA and the Free Trade Area of the Americas.⁸⁹ In some cases, cooperative activities had grown into efforts to introduce competition law and policy into the frameworks governing intraregional trade. For instance, APEC members had recently undertaken studies on competition laws and policies and were now working on a set of non-binding principles to enhance competition and regulatory reform. In addition, many regional trade agreements such as the European Union, the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and NAFTA were concerned, to various degrees, with the harmonization of

⁷⁹ M/8, paragraph 58.

⁸⁰ M/9, paragraph 23.

⁸¹ M/8, paragraph 44.

⁸² M/9, paragraph 29.

⁸³ M/8, paragraph 45 and M/9, paragraph 29.

⁸⁴ M/8, paragraph 45.

⁸⁵ M/8, paragraph 47.

⁸⁶ M/8, paragraphs 53 and 75.

⁸⁷ M/9, paragraph 22.

⁸⁸ M/8, paragraph 53 and related comments in paragraph 47.

⁸⁹ M/8, paragraphs 49, 51 and 55.

competition policies. The degree of harmonization was a function of the level of economic integration. For example, the European Union had established a supranational body to enforce relevant competition provisions under the Treaty of Rome. In contrast, NAFTA did not set forth common standards on competition policy, but simply required parties to adopt or maintain measures proscribing anti-competitive business practices and to take appropriate action with respect thereto. Moreover, a high level of economic integration had led the European Union and ANZCERTA to eliminate anti-dumping laws in regional trade, while anti-dumping laws continued to be maintained in the context of NAFTA.⁹⁰

It was suggested that regional cooperation could also play a useful role in the provision of technical assistance. This did not involve developed countries exclusively. For instance, one developing country with a fully functioning competition regime had run since 1996 an international training programme for other developing countries.⁹¹ It was pointed out that, through participation in regional seminars, competition officials became familiar with and gained confidence in their counterparts from other countries of human networks of competition.⁹²

The point was made that cooperation on competition issues at the multilateral level often took the form of policy advice, technical assistance, and the preparation of specialized studies. UNCTAD, the World Bank and the OECD had been especially active in this regard. More specifically, the Group was informed that activities carried out by UNCTAD with respect to cooperation on competition matters included the conduct of meetings of the Intergovernmental Group of Experts (IGE) and the provision of technical assistance, in addition to preparing research studies, and drafting and reviewing guideline documents such as the Model Competition Law, the Handbook on Competition Laws, and the UN Set on Restrictive Business Practices. Issues currently addressed by the IGE included the relationship between the competition authorities and relevant regulatory agencies, especially in respect of privatization and demonopolization processes; international merger controls, in particular where they had an impact on developing countries; and the creation of a culture of competition. UNCTAD had regularly held training activities for national competition authorities, sometimes in cooperation with institutions such as the World Bank and the OECD. In addition, UNCTAD had assisted a number of countries in the process of drafting and adopting competition legislation. UNCTAD concurred with the view that cooperation should not be limited to assisting national competition authorities, and that in parallel broader efforts were needed to help national competition authorities educate all constituencies, including consumer organizations and businesses, with respect to the benefits of competition policy. Current research studies by UNCTAD focused on experiences with international cooperation on competition policy and how competition policy addressed the exercise of intellectual property rights.⁹³

It was noted that the World Bank had provided advice on the implementation of competition policy in the context of country-specific structural adjustment programmes. A number of national governments had been assisted in addressing competition issues at times of economic crisis, with a view to strengthening the role that competition policy could play in the revival of the domestic economy. In addition, the Bank had provided extensive technical assistance by organizing conferences, seminars and workshops. The Bank had also prepared a number of specialized publications intended to disseminate best practices in the field. A recent publication entitled "A Framework for the Design and Implementation of Competition Policy"⁹⁴ provided a comprehensive overview of issues concerning the application of competition law in developing and transition economies, together with various options reflecting different country circumstances.⁹⁵ In performing its cooperation activities in the

⁹⁰ M/8, paragraph 55.

⁹¹ M/8, paragraph 55.

⁹² M/8, paragraph 60.

⁹³ M/8, paragraphs 64 and 65.

⁹⁴ A Framework for the Design and Implementation of Competition Policy (World Bank and OECD, 1999).

⁹⁵ M/8, paragraph 62.

area of competition policy, the Bank increasingly attempted to involve the private sector in conferences, seminars and workshops, as well as in the provision of technical advice.⁹⁶

The Group was also informed that up to the end of 1998, the OECD had conducted and participated in over 90 programmes on competition policy, for both member and non-member countries. Most of these programmes had been organized and led by the OECD itself; the remaining programmes had been joint ventures, typically with the World Bank, a single country such as Korea, or with a competition agency like the United States Federal Trade Commission. In other cases, the OECD had sent in experts to participate in events such as APEC conferences, and the training seminars organized by the Japan Fair Trade Commission. In addition, the OECD had provided technical assistance to non-member countries by way of preparing commentaries on draft competition laws. This had often been followed by seminars that examined case studies. Typically, new competition officers presented cases and a panel of very experienced enforcers from a number of OECD countries discussed how those cases might be analysed. Such seminars had proved to be one of the most effective ways to convey the best competition practices. Best practices were also disseminated through publications, including the book prepared jointly with the World Bank on the framework for the implementation of competition law. Recently, the OECD had launched a journal⁹⁷ as a vehicle to make available to the public the extensive analytical work on competition issues carried out by this organization.⁹⁸ Lastly, the OECD had held a conference on trade and competition policy featuring participation by 30 non-OECD member countries and representatives of the Secretariats of the WTO and UNCTAD, in addition to the 29 OECD member countries. A report on the conference had been published recently.⁹⁹

Differing views were expressed as to whether cooperation on competition matters at the multilateral level should be formalized through an agreement to be negotiated in the WTO. The main arguments in favour of setting up a multilateral agreement on competition issues were as follows. First, the points were made that OECD and UNCTAD could not go beyond issuing non-binding guidelines and recommendations and that, in contrast, the WTO was the best-suited forum for undertaking discussions on multilateral competition rules, as it was equipped with legally binding rules and an effective dispute settlement system, and had a long experience with multilateral negotiations striking a balance of interests between developed and developing countries.¹⁰⁰ Competition-related provisions of existing WTO Agreements were inadequate for addressing competition problems across the board, including private anti-competitive practices. The Kodak-Fuji case had illustrated the lack of tools at the disposal of the WTO. Hence, there was a need to reinforce the WTO regime by the incorporation of competition-related norms. The view was expressed that an ideal model for an international competition framework would contain provisions on a supranational competition authority, as well as unified substantive and procedural norms. One model close to this ideal form was the 1993 Munich Code which had been proposed by the International Antitrust Code Working Group (IACWG). However, a TRIPS-type agreement could be considered as a more practical option. Under this type of agreement, every Member would be required to commit itself to incorporate substantive norms of competition into its domestic law, and to establish independent administrative and judicial bodies to oversee implementation and guarantee greater uniformity in interpretation of the agreement. The WTO dispute settlement procedures could be used as the appropriate mechanism for addressing violations of the substantive norms. This approach would not presuppose the pre-existence of domestic competition laws, but would require the eventual incorporation into the national legislation of provisions relating to competition.¹⁰¹

⁹⁶ M/8, paragraph 63.

⁹⁷ OECD Journal of Competition Law and Policy.

⁹⁸ M/8, paragraphs 59 and 61.

⁹⁹ OECD, Trade and Competition Policies: Exploring the Interface (Paris: 1999).

¹⁰⁰ M/8, paragraph 56.

¹⁰¹ M/8, paragraph 57.

It was also suggested that a multilateral initiative through the WTO could augment and reinforce bilateral and regional initiatives. Through commitments on transparency and national treatment, such an agreement would confirm the rules of business conduct in foreign markets and ensure that firms were treated in a non-discriminatory manner with respect to the application of competition policy. The WTO provided the most appropriate forum for an effective and comprehensive discussion of competition issues within a multilateral framework. A multilateral agreement on competition policy could serve to solidify the gains from trade liberalization by disciplining private barriers to trade, improving cooperation and communication among Members on competition policy matters, and promoting greater certainty as to the rules for conducting business in foreign markets.¹⁰²

The view was expressed that an international framework for competition policy rules could be structured around the following three points.¹⁰³ First, each WTO Member would commit itself to adopting domestic competition rules. Second, such rules would be based upon common principles. Third, there would be some rules for cooperation. There were two alternatives for developing rules on cooperation. Under the first approach, one would seek convergence and subsequently one would envisage cooperation. Under the second approach, lack of convergence would not delay cooperation; rather, the degree of cooperation would be tailored to the degree of convergence already achieved. Both approaches could be applied concurrently. This was a good illustration of the complementarity between bilateral and multilateral approaches to cooperation. It was suggested that positive comity should not enter this multilateral framework as a binding tool. It had rarely been applied and could be a problem for competition authorities closely attached to their work programme and priorities and who did not wish to be overwhelmed by inquiry requests transmitted by other countries. In contrast, the multilateral framework could feature an obligation to notify investigations having an important effect upon WTO Members. In addition, the provision of technical assistance could play an important role within a multilateral framework. It was suggested that technical assistance would be provided more efficiently if there was increased cooperation among the agencies performing this function.¹⁰⁴

The view that development of a multilateral agreement on competition matters was premature and might prove unwarranted was also expressed. In this connection, it had been suggested that an adequate competition policy could in some countries reside basically in measures liberalizing trade and investment flows, complemented by sectoral regulatory policies where appropriate, without a competition law or enforcement authority. In this context, there was a question as to how such a country could cooperate with other WTO Members on competition matters. More generally, the point was made that half of the WTO Members had still not adopted a competition law nor had they established a competition authority. Hence, proposals to set up a multilateral agreement on competition issues seemed premature. In addition, it was suggested that proposals regarding a multilateral framework agreement addressed the question of how to construct a WTO agreement on competition policy, but not why such an agreement was necessary. In addition, the proposals tabled were not sufficiently clear in many aspects. For instance, would the proposed agreement be binding? Would it be limited to rules regarding cooperation? Would it feature dispute settlement provisions?¹⁰⁵ In addition, it was suggested that notification of competition actions would make the burden of WTO notifications even more onerous. This was a serious concern for developing countries. Moreover, it was said that notification of competition actions could be unnecessary given that the firms concerned would be better placed to inform their governments about such actions directly and this was a quicker procedure than notification. The point was also made that the dissemination of experiences in the application of competition policy did not require a multilateral framework or a WTO agreement.¹⁰⁶

Certain "markers" were put down in respect of the arguments made in favour of developing WTO instruments addressing cooperation on competition law and policy. The question was posed as to

¹⁰² M/9, paragraph 29.

¹⁰³ M/8, paragraph 70.

¹⁰⁴ M/9, paragraph 22.

¹⁰⁵ M/9, paragraph 30.

¹⁰⁶ M/9, paragraph 31.

whether anti-competitive practices with cross-border effects were all that prevalent? A few well-publicized multi-jurisdictional cases did not make such problems global nor did they make a case for a global solution. Second, the view was expressed that bilateral and regional approaches had been relatively more successful than multilateral ones. None of the instruments that had been negotiated or discussed at the multilateral level, such as UNCTAD's Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, or the numerous instruments developed by the OECD, were binding. They remained as recommendations or guidelines. Third, did the benefits of cooperation under the auspices of the WTO outweigh the considerable costs entailed in achieving the degree of commonality of approach required to ensure the success of multilateral cooperation? Members would only be prepared to cooperate if there was a shared perception of common interest and mutual benefit.¹⁰⁷ The view was also expressed that the notion that bilateral agreements were of limited scope and had to be supplemented by a multilateral agreement was directly contradicted by experience with respect to the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. In this case, the existence of a multilateral agreement had not generated the expected benefits and it was now argued that such benefits were contingent upon the establishment of bilateral agreements.¹⁰⁸

In addition, the view was expressed that the notification of competition law enforcement actions on a multilateral basis would be burdensome and unworkable. Such notifications called for great confidentiality and secrecy, given the due process protection that had to be accorded to companies involved in antitrust investigations. They were made ordinarily on a bilateral basis; that is, only the affected country was notified. Notifying upcoming enforcement actions on a multilateral basis would be inconsistent with requirements of confidentiality and could seriously impair the effectiveness of such actions. Second, the justification for a multilateral agreement standardizing country practices in the area of competition was not evident. There was nothing theoretically inappropriate or offensive about having 80 plus competition laws in the world. Third, centralizing the provision of technical assistance to new competition agencies did not seem warranted. Countries seeking assistance usually had a clear idea of what they needed and who they needed it from, and thus there was no point in having some centralized organization step in to provide overall coordination. There was nothing wrong with a developing country seeking technical assistance and policy advice from several countries at once.¹⁰⁹

In response to the foregoing observations, it was suggested that one of the main reasons justifying cooperation on competition matters within a WTO framework was that anti-competitive practices increasingly had an international dimension and therefore affected the interests of a multiplicity of WTO Members. Second, the notion that anti-competitive practices with a global dimension were unimportant was inaccurate. On the contrary, investigations against international cartels, merger reviews involving multiple jurisdictions, and anti-competitive practices with cross-country effects were a frequent occurrence. Third, if a WTO Member conducted a competition investigation and this investigation affected the interests of other WTO Members, it seemed normal that there should be some process for signalling that such investigation had taken place, as well as a framework for consultations where other WTO Members could raise any particular concerns relating to that investigation. Fourth, the need to avoid overburdening the WTO system of notifications was clear, and it was recognized that this called for a high degree of flexibility. Fifth, while there were obvious limits to the exchange of confidential information, it was important not to lose sight of the fact that in every investigation there was a significant amount of non-confidential information which could be exchanged. Sixth, it was important that the commitments with respect to cooperation undertaken as part of a multilateral framework were seen as binding, although some aspects of those commitments, for instance those relating to notifications and consultations, did not easily lend themselves to dispute settlement. Finally, awaiting a broader dissemination or development of competition law across the

¹⁰⁷ M/9, paragraph 26.

¹⁰⁸ M/9, paragraph 31.

¹⁰⁹ M/9, paragraph 25.

world to engage in cooperation was not practical, because WTO Members risked in fact never cooperating if they waited to have enough convergence.¹¹⁰

The suggestion was also made that, independently of whether a multilateral framework on competition issues materialized, as a further step in the dissemination of experiences regarding the application of competition law, it would be worthwhile to launch regular reviews at the WTO in the area of competition policy, including the handling of individual cases. The WTO already had the Trade Policy Review Mechanism (TPRM) in place but the TPRM dealt with broader trade issues and one could not expect to have sufficient discussion of competition law and policy as part of the TPRM work. It was also said that technical assistance could make a substantial contribution towards helping Members solve some of the difficulties involved in implementing a competition regime. An option worth considering was the creation of technical cooperation and competition advocacy support systems within the WTO.¹¹¹

The point was also made that multilateral cooperation should not and would not absorb or replace bilateral and regional cooperation schemes. Rather, all three approaches could and should develop in a mutually complementary and reinforcing way.¹¹² It was also suggested that cooperation on competition matters should have at its heart an educational purpose, instead of being driven by a results-oriented agenda. It was said in this regard that competition policy, despite its positive effects on welfare, was not supported by strong constituencies. As a result, the world was getting less than the optimum in terms of competition policy. This "political market failure" could be remedied by educating the public on the benefits of competition policy. Any of the three basic approaches to cooperation (bilateral, regional and multilateral) would be helpful to meet this purpose, although cooperation at the level of the WTO could be especially helpful in addressing this problem. Furthermore, the implementation of competition policy involved very large economies of learning and hence cooperation at the multilateral level was bound to be useful especially for countries beginning to operate competition regimes.¹¹³

The view was expressed that the nature of cooperation on competition matters varied with the degree of institutional development. Cooperation in this area seemed to follow a pattern consisting of three stages. At a very early stage, cooperation focused on the provision of technical assistance. In a second and perhaps intermediary stage, cooperation took the form of relatively simple agreements not requiring the exchange of confidential information. At a more advanced stage, cooperation took place through sophisticated agreements, including provisions on the exchange of confidential information.¹¹⁴ Another view was that cooperation should be structured into four stages. The first stage would be educational, in broad terms. The second would involve the provision of technical training, in order to allow a lesser developed competition regime to grow into a mature and sophisticated system. The third would involve voluntary cooperation among competition authorities regarding, for instance, the exchange of ad hoc information. The fourth stage would involve formal cooperation on the basis of legally binding instruments. This progressive approach would be reflective of reality and would best address the actual needs of individual Members.¹¹⁵

It was suggested that there was a need to develop mechanisms, both regional and global, for cooperation and communication with other competition agencies. The future design of international cooperation mechanisms should be directed at meeting four specific needs: (i) technical assistance to Members, especially those that still did not have competition systems in place or were at the initial stages; (ii) promotion of a culture of competition, in view of the fact that national competition agencies and competition legislation were necessary but not sufficient to accomplish this objective;

¹¹⁰ M/9, paragraph 34.

¹¹¹ M/9, paragraph 27.

¹¹² M/8, para 52.

¹¹³ M/8, paragraph 66.

¹¹⁴ M/8, paragraph 66 and M/9, paragraph 28.

¹¹⁵ M/8, paragraph 77.

(iii) the identification of priority areas with respect to which the efforts of competition agencies could be more effective; and (iv) the dissemination of information concerning best practices in applying competition policy, including institutional transparency. Some of these ideas had been reflected already in a Declaration of Principles issued in October 1998 by the countries participating in the Free Trade Area of the Americas. The generalized adoption of specific cooperation mechanisms, such as positive comity, or the OECD Recommendation on Hard Core Cartels, could require some prior efforts at harmonization. This was the case because cartels, for instance, could be treated under the *per se* rule or under the rule of reason depending upon the jurisdiction.¹¹⁶

The view was expressed that special attention should be accorded to the specific situation of certain developing countries, including African countries, that had not yet adopted domestic legislation on competition matters, or created institutions for the enforcement of competition policy. Two levels of technical cooperation were potentially useful for such countries. At the operational level, countries could be assisted in developing their institutional capabilities on a bilateral, on a regional and on a multilateral basis; relevant institutions and organizations in this regard were the World Bank, the OECD, the European Commission as well as the UNCTAD and the WTO. A second level of cooperation related to the analysis of certain anti-competitive practices with cross-country effects; mega-mergers, for example. Further work was warranted on both of these aspects.¹¹⁷

The view was also expressed that cooperation intrinsically had a bilateral, a regional and a multilateral facet; each of these approaches had some advantages and some inherent shortcomings. Countries could adopt one or more of these approaches in a non-exclusive manner, depending on their own experience in implementing competition law and their level of economic development.¹¹⁸ More specifically, it appeared that bilateral cooperation tended to take place between countries with similar competition policy regimes. Since competition policy regimes were closely linked to the level of economic development of Member countries, this implied that bilateral cooperation, or at least formal bilateral cooperation, was taking place predominantly between developed countries. This also seemed to be the case for regional cooperation. It was important for the Working Group to examine more closely how cooperation could be fostered amongst countries with different competition regimes, at different levels of development. This would make cooperation a global tool. In fact, enhanced cooperation with countries with nascent competition policy regimes would provide these countries with valuable insights. Similarly, enhanced communication with countries which did not yet have a national competition policy regime would go a long way in convincing them of the benefits of adopting such a regime. The Working Group should focus on this aspect of cooperation. Furthermore, multilateral cooperation on competition matters did not have to be based on a formal framework of rules. The view was also expressed that it was imperative to ensure that global welfare, and not national welfare, was used for evaluating anti-competitive practices. A national welfare standard implied treating anti-competitive behaviour in the home market differently from anti-competitive behaviour in foreign markets. Further, priority in international cooperation should be accorded to the control of anti-competitive behaviour of firms with international market power. Responsibility for such control would tend to fall on large economies, since firms with international market power tended to be based in large economies.¹¹⁹

The view was also expressed that, by questioning the possibility of increasing degrees of cooperation, some Members had already taken a position on what was the level of cooperation they could accept. This seemed prejudicial, however, since there was not a direct connection between cooperation consisting of technical assistance and more developed and elaborate forms of cooperation. Besides, the context in which cooperation took place was evolving given the speed at which developing countries and transitional economies were adopting competition policy. Limiting discussions to

¹¹⁶ M/8, paragraph 67.

¹¹⁷ M/9, paragraph 23.

¹¹⁸ M/8, paragraph 74.

¹¹⁹ M/8, paragraphs 74-76.

educational cooperation could mean failing to anticipate the real needs that developing countries and transitional countries might face in the near future. In other words, it did not seem sensible to differentiate in a static way educational cooperation from more elaborate forms of cooperation.¹²⁰

III. THE CONTRIBUTION OF COMPETITION POLICY TO ACHIEVING THE OBJECTIVES OF THE WTO, INCLUDING THE PROMOTION OF INTERNATIONAL TRADE

This item was discussed by the Working Group at its meetings on 19-20 April and 10-11 June 1999. Written submissions on this item were provided by the delegations of Hong Kong, China; Japan; the European Community and its member States; and Korea (documents W/118 in the case of Hong Kong, China; documents W/119, W/122, W/134 and W/135, in the case of Japan; document W/130 in the case of the Community; and document W/133 in the case of Korea). Subsequent to the meeting of 10-11 June, a written submission on this item was provided by Mauritius (W/137). In addition, the representatives of the Dominican Republic; Egypt; the European Community and its member States; Hong Kong, China; Hungary; India; Japan; Korea; Malaysia; Norway; Pakistan; Switzerland; the United States; and Zimbabwe, on behalf of the WTO African Group, made oral statements or posed questions on this item during the two meetings. The observer from the OECD provided information on relevant activities of his organization.

The view was expressed that the application of certain WTO rules benefited import-competing producers rather than promoting competition and consumer welfare. This was an anomaly, particularly in an increasingly globalized economy. It was suggested that, to ensure that WTO rules remained valid, credible and up to date, there was a need for a competition-oriented reform of the WTO system. The focus of this reform should be to link WTO rules to the broad competition principles of open markets, non-discriminatory conditions of competition, and consumer welfare. Along with the implementation of this approach, due attention needed to be directed to governmental restraints, such as trade measures restricting import and export competition, and exemptions from competition rules such as those concerning export cartels.¹²¹ It was also suggested that it would be unproductive to introduce into the WTO system a multilateral framework for competition policy, without first addressing the anti-competitive elements built into the current WTO disciplines. There was no question that competition policy must be concerned with both governmental restraints and private practices restricting competition and trade.¹²² The view was also expressed that the purpose of the Working Group was to examine the interaction between trade and competition policy, with the long-term goal of seeing how the WTO could strive towards a greater convergence between these two areas.¹²³

The suggestion was made that competition policy could contribute to achieving the objectives of the WTO by helping to shape trade policy. While competition policy perspectives could be brought into sectoral regulatory schemes by including the competition agency in policy-making, competition laws had no power to affect trade-restrictive measures taken by the government itself directly impeding competition with foreign competitors. The view was expressed that trade remedies, such as anti-dumping, were good candidates for reform; therefore, the possibility of introducing competition policy perspectives into the agreements governing such measures should be examined.¹²⁴ The view was expressed that anti-dumping measures had a greater distorting effect on trade than safeguard measures, in that they did not require offsetting concessions or adherence to the WTO principles of MFN treatment and non-discriminatory administration of quantitative restrictions. The abuse of anti-dumping measures could be remedied by bringing such measures in line with their original function. In this regard, the view was expressed that anti-dumping measures had originally been intended to

¹²⁰ M/9, paragraph 28.

¹²¹ M/8, paragraph 80 and W/9, paragraph 49.

¹²² M/8, paragraph 84.

¹²³ M/8, paragraph 88.

¹²⁴ M/8, paragraph 81 and W/9, paragraph 52.

regulate "predatory pricing" in international trade, while competition laws did so with respect to the domestic market. Article VI of the GATT, however, restricted "price discrimination" in general, instead of regulating specifically "predatory pricing" in international transactions. Thus, there was a disparity between the wording of this provision and the original objectives of anti-dumping measures.¹²⁵ Economists generally agreed that, in the absence of predatory intent, dumping was basically harmless for the importing country, because the benefits consumers gained from dumping were greater than any harm undergone by producers.¹²⁶ Accordingly, it was suggested that the focus of anti-dumping measures should be changed to be directed at the regulation of "predatory pricing", rather than of "international price discrimination". The above standard would require the following: first, use of the concept of "marginal cost" or "average variable cost" as the basis for the definition of normal value; second, verifying the probability of future success in predation prior to the application of anti-dumping measures, which would require examination of the conditions of competition in the domestic market of the importing country; and third, when considering the application of anti-dumping measures, the examination not only of producer interests (reflected in injury to the domestic industry), but also of the benefits to consumers that arose from low-priced imports and would be curtailed following the application of such measures. In other words, the application of anti-dumping measures should be assessed from the viewpoint of the economy as a whole.¹²⁷ The view was also expressed that the mere initiation of an anti-dumping investigation was in itself a large threat to exporting companies, and that the trade distortive effects of the filing of anti-dumping suits should be considered when reviewing anti-dumping regimes from the perspective of competition policy.¹²⁸

The argument was made that the WTO rules on safeguard measures also needed to be reviewed from a competition perspective. For example, Article 11 of the Agreement on Safeguards did not address purely private business practices, which raised the question of whether measures such as voluntary restraints initiated by private firms were prohibited under this Article. The reason why Article 11 banned grey-area measures such as voluntary export restraints and ordinary market arrangements was that such measures adversely affected competition. Therefore, whether or not certain grey-area measures were prohibited under Article 11 should be decided on the basis of the effects these measures had on competition rather than on the basis of whether the government was involved in the establishment of such measures. This interpretation appeared to be consistent with the letter and the spirit of the Preamble to the Agreement on Safeguards, which emphasized the need to enhance rather than limit competition in international markets.¹²⁹

In response to the foregoing suggestions, the view was expressed that the development of possible reforms of existing WTO rules was inconsistent with the mandate set for the Working Group in the recommendation that had been approved by the General Council (WT/GC/M/32, page 52), since this recommendation referred to the "contribution" of competition policy to the objectives of the WTO. In addition, if the Working Group were to make a decision to consider how competition elements could be infused into WTO provisions, this examination should be holistic and non-discriminatory as between WTO provisions. For instance, a theoretical argument could be made that this review should include the issue of how competition elements could be infused into the WTO provisions regarding special and differential treatment, among many others. It should not be neglected that certain WTO rules, such as those on trade remedies, fulfilled a particular role in the balance of concessions offered by Members and that any attempt to philosophically refashion those rules would fundamentally disrupt the existing balance in the WTO system.¹³⁰ The view was also expressed that it was an over-simplification to posit the convergence of trade policy and competition policy and it was not

¹²⁵ M/8, paragraphs 81 and 82.

¹²⁶ M/8, paragraph 84.

¹²⁷ M/8, paragraph 82.

¹²⁸ M/8, paragraph 81.

¹²⁹ M/9, paragraph 50.

¹³⁰ M/8, paragraph 85.

necessarily the case that one policy was superior to the other.¹³¹ By way of response to these points, the view was expressed that suggesting that WTO provisions on special and differential treatment had an anti-competitive effect, and could therefore be subject to review, showed a lack of clarity about what those provisions did, and how they contributed to increasing the competitiveness of developing countries.¹³² Further, the mandate to study the interaction between trade and competition policy had clear limits and could not possibly encompass themes such as labour or the environment, since both themes were clearly unrelated to the mandate of the Group.¹³³

The view was expressed that competition cases having an international dimension were relevant to market access and thus to achieving the objectives of the WTO. They were bound to increase in numbers as globalization proceeded, posing a major challenge to the WTO. However, actions to curb anti-competitive behaviour originating in a foreign country were difficult or at times impossible to enforce.¹³⁴ This was an area of concern for developing countries and merited further discussion by the Group.¹³⁵ In such cases, the competition authorities of the country concerned had to request the assistance of the competition authorities of the country where the anti-competitive behaviour took place. For a variety of reasons, however, such assistance was not always forthcoming.¹³⁶ The Working Group should focus on anti-competitive practices with a significant impact on international trade. There was a common understanding that hard-core cartels were of special significance both from the point of view of international trade and from the point of view of competition law.¹³⁷ The argument was made that the lack of multilateral rules and insufficient cooperation among the relevant authorities in the field of competition affected negatively both international trade and investment, since anti-competitive practices of a private or regulatory nature could seriously restrain market access and market presence.¹³⁸

The impact of import cartels, export cartels and international cartels on international trade and market entry by foreign firms was considered. It was said that the impact of import and export cartels was fairly obvious. Import cartels directly restricted competition in the domestic market between domestic and foreign suppliers by restraining imports of goods and services. Export cartels restricted competition in the foreign market to which exports were directed. International cartels, in turn, prevented competition in global markets. Of course, this had an effect upon the domestic market as it generated a rise in the price of goods and services sold domestically and a reduction in consumer welfare. A complicated question was whether domestic hard-core cartels, such as price-fixing, output allocation, and the division of markets, had adverse effects on international trade. Such cartels did not distort international trade by themselves. For example, price-fixing would result in high prices in the domestic market. As high prices in the domestic market would attract entry by foreign firms, a successful domestic cartel had to be accompanied by government measures excluding foreign companies from the domestic market, such as tariffs and non-tariff barriers. Another possibility was for domestic firms to behave anti-competitively to jointly prevent the entry of foreign firms; for example by controlling the distribution of imported goods.¹³⁹

The view was expressed that functioning competition policies contributed to the fulfilment of WTO objectives not only in the area of trade but also in that of investment. Open policies toward foreign direct investment and properly constituted and functioning competition policies were mutually supportive. On the one hand, liberal investment rules, by making the market contestable, could challenge domestic oligopolies and reduce the likelihood of cartels and monopolies. On the other hand, effective competition policies could safeguard against possible abuses of market power by

¹³¹ M/9, paragraph 46.

¹³² M/8, paragraphs 88 and 89.

¹³³ M/8, paragraphs 87, 88 and 90.

¹³⁴ M/8, paragraph 86.

¹³⁵ M/8, paragraph 89.

¹³⁶ M/8, paragraph 86.

¹³⁷ M/8, paragraphs 91 and 92.

¹³⁸ M/8, paragraph 83.

¹³⁹ W/9, paragraph 45.

foreign investors. The decision of the General Council taken in December 1998 to extend the mandates of the two Working Groups established in Singapore gave Members an opportunity to prepare the ground for opening negotiations on establishing multilateral sets of rules for investment, as well as for competition.¹⁴⁰

Views were expressed regarding the potential benefits of a multilateral framework agreement on competition policy, and the choice of the WTO as the forum to address this issue. It was said that, while divergences between countries with respect to the substantive provisions of competition laws and enforcement practices might pose difficulties for establishing a multilateral framework on competition policy, they also heightened the potential benefits of an agreement.¹⁴¹ The absence of competition laws in many Member countries should not be allowed to constitute a difficulty, just as had not the fact that, at the time that the Uruguay Round negotiations on intellectual property had begun, relatively few Members had had a functioning regime protecting intellectual property rights.¹⁴²

The view was expressed that a multilateral framework on competition policy would make a major contribution towards the promotion of international trade. Such a framework should be sought as part of a more general and balanced WTO agenda. There were several benefits to be derived from such a multilateral framework. First, although it was generally recognized that anti-competitive practices had a significant adverse impact on international trade and investment, especially in the context of globalization, there was no mechanism at the WTO to address such practices. A multilateral framework on competition would play this role. Second, because many countries had adopted and were enforcing competition laws, and because anti-competitive practices increasingly had an international dimension, there seemed to be a need for a multilateral framework of cooperation, complementing cooperative efforts at the bilateral and at the regional levels. Third, a WTO agreement on competition would contribute towards the spread of a competition culture and this would reinforce the WTO system overall. Finally, a multilateral agreement on competition would be very helpful in cases falling under a multiplicity of jurisdictions and this could help reduce unnecessary costs to business regarding compliance with the competition regime.¹⁴³

The view was expressed that the principles/standards incorporated into such a framework of rules had to be flexible enough to accommodate the differences in objectives, priorities, rules, procedures and institutions in the competition regimes of Members. This diversity called for the adoption of a broad competition perspective rather than for harmonization. Convergence should occur only where convergence mattered and where it helped the process of international cooperation. A WTO framework imposing rigid requirements would not only hinder meeting the specific development needs of developing countries, but could also undermine the more sophisticated competition policies/rules of developed economies.¹⁴⁴

The point was made that, in examining proposals for multilateral rules, the development dimension should be firmly borne in mind.¹⁴⁵ While one of the objectives of a competition agreement could be to gradually limit exclusions from competition law, the progressivity of this process would have to take into account differences in levels of development. Another example of the kind of flexibility that was required was that a multilateral framework would not necessarily envisage commitments regarding merger control. A flexible approach could also be adopted with respect to small- and medium-sized enterprises. Cooperation was another key aspect from a development perspective. It would provide sustained support for the process of progressive development of a competition enforcement structure in developing countries. Cooperation in individual cases and general

¹⁴⁰ M/8, paragraph 83.

¹⁴¹ M/9, paragraph 43.

¹⁴² M/9, paragraph 48.

¹⁴³ W/9, paragraph 40.

¹⁴⁴ M/8, paragraph 80 and W/9, paragraph 41.

¹⁴⁵ M/8, paragraphs 89 and 90, and W/9, paragraph 42.

exchanges of experiences should be core components of a multilateral agreement on competition and should be geared towards meeting the particular concerns that developing countries had expressed in this field. The WTO itself could become a significant provider of technical assistance in the competition area.¹⁴⁶

The point was made that somewhat more specific guidance and support were needed for small, open developing countries which were committed to market principles but lacked experience with the administration of competition laws and policies. In the light of this, the view was expressed that the development of a possible WTO discipline preceded by voluntary guidance and support regarding competition law and policy implementation could help to support ongoing liberalization efforts and sustain the momentum for deepening the integration of small economies as well as the large number of developing countries who were looking forward to getting well entrenched in the mainstream of the multilateral trading system. This could also be viewed in the context of the international coherence initiatives approach. Taking account of these challenges and constraints, it was suggested that future work on competition policy in the WTO could focus on the following matters: (a) the core elements of competition policy in a developing economy context, with particular reference to smaller economies; (b) practical approaches to institution-building that would economize on administrative costs and permit the exploitation of synergies with other relevant market-place institutions; (c) promotion of coherence between competition policy and related laws/policies and WTO disciplines and also coherence in related activities and initiatives of the international community; and (d) practical approaches to cooperation and assistance in the implementation of competition law and policy, both at the regional and multilateral levels.¹⁴⁷

The point was made that the analytical demands placed on developing countries regarding preparations for the next Round of negotiations were huge. In the light of this, certain conditions should be established as a basis for possible negotiations regarding multilateral competition rules. In particular, technical assistance should be provided that would venture beyond the traditional support to competition agencies in terms of development of competition laws and their enforcement and include scrupulous assessment of the expected outcomes and the implications for developing countries of multilateral competition rules. A necessary condition for negotiating multilateral rules should therefore be the conclusion of a thorough educative process (for a period of up to two years), following which negotiations would be launched.¹⁴⁸

A number of specific ideas regarding the elements of a multilateral framework on competition policy were tabled for discussion. According to one suggestion, a first element related to common principles and rules on competition law and policy. These would include principles such as transparency and non-discrimination which were essential building blocks for both effective competition law and the multilateral trading system. A second element concerned measures to address anti-competitive practices that had a significant impact on international trade and investment. The view was expressed that it was generally recognized that hard-core cartels fell in this category and could be treated under a common rule. In contrast, in areas where competition law relied on a case-by-case assessment, such as abuse of dominant position or monopolization, and vertical agreements, a common rule was not the right approach because it would eliminate the flexibility which was essential for a proper assessment. It was suggested that the Working Group could discuss how other practices might be incorporated into the framework. A third element suggested for consideration concerned cooperation. Fourthly, it was suggested that dispute settlement within a multilateral agreement on competition was a very complex issue which would require further study. It was clear, however, that dispute settlement in the area of competition law and policy should not involve the review of individual decisions taken by national competition authorities.¹⁴⁹

¹⁴⁶ M/9, paragraph 42.

¹⁴⁷ M/10, paragraph 4.

¹⁴⁸ M/10, paragraph 5.

¹⁴⁹ M/9, paragraph 41.

Another suggestion posited that non-discrimination and transparency should be two key elements of a multilateral competition framework. According to this proposal, the substantive provisions of this multilateral framework should include commitments with respect to issues such as the adoption of a competition law, the establishment of a competition authority, and the prohibition of hard-core cartels. A multilateral framework should also feature provisions on international cooperation for better enforcement of competition law and policy. However, there would not be any commitments regarding positive comity. Further, a number of specific provisions would address the development dimension: grace periods, exemptions from certain obligations, waivers, and reservations. Technical assistance would also be of importance in this connection. Finally, while it would be difficult to impose an obligation on competition agencies to assume a competition advocacy role, positive support could be provided for competition advocacy to enhance the contestability of markets.¹⁵⁰

A number of further suggestions were made regarding the implementation of a WTO framework on competition policy. First, it was suggested that transitional arrangements should be an integral element of a multilateral framework. A second suggestion was to prioritize anti-competitive practices to be banned. A third suggestion was to examine the appropriateness of exemptions systems, particularly any adverse effects on economic development. A fourth suggestion was to study further whether competition law was a necessity. In particular, it should be discussed whether there were ways to render markets competitive without resorting to a competition law. Fifth, it was desirable to conduct regular reviews of competition policy, including the handling of individual cases by Members. Sixth, it was suggested that a technical cooperation and competition advocacy support system be created within the WTO.¹⁵¹

In response to the above proposals and observations, the view was expressed that a multilateral agreement of a binding nature would provide no assurance of doing a better job in promoting mutual education, cooperation and understanding than the efforts that were taking place in the Group and other international fora. In fact, activities such as education, cooperation, technical assistance, and further analytical exploration could occur quite naturally outside the bounds of a legal framework. In addition, such an agreement, even if it were relatively general in scope and content, would still pose the risk of interfering seriously with the intelligent and dynamic evolution of methodologies and practices to address anti-competitive conduct. At this stage there were many ways in which the Working Group could continue to pursue many of the sensible goals motivating the various suggestions made. Whether the WTO could continue to host some or all of these activities was to be settled elsewhere in the context of creating an agenda for the future work of the WTO. According to this view, where appropriate and necessary, competition considerations would continue to influence the development of WTO rules and market access provisions. For instance, competition-related measures had been integral to the achievement of a high-quality agreement on the liberalization of trade on basic telecommunications services. The means by which competition-related concerns became important for the purpose of ensuring market access was frequently a function of the attributes of the trade involved, in particular the products or the particular markets concerned, and it was not necessary or even desirable to consider such means on a general basis. Thus, there was no need to undertake some sort of comprehensive review of all WTO provisions to determine whether they needed to be infused with allegedly pro-competitive modifications.¹⁵²

The view was also expressed that competition policy could make an important contribution to the WTO objective of promoting economic development. In this regard, the point was made that, while limiting the number of the players in a given industry might be thought to facilitate the attainment of economies of scale and the allocation of resources in accordance with policy priorities, experience had shown that promoting rather than curbing competition in the domestic market was more likely to improve international competitiveness. A second issue was the impact that exemptions and

¹⁵⁰ M/9, paragraph 43.

¹⁵¹ M/9, paragraph 44.

¹⁵² M/9, paragraph 46.

exceptions from competition law had on economic development. Again, experience had shown that such regimes had had a negligible impact on industrial development. This suggested that careful studies should be undertaken prior to the introduction of exemption systems, taking into consideration the balance between the negative impacts of these systems on competition and other policy objectives. In addition, after their introduction such systems should be regularly reviewed in order to determine whether they should be revised or abolished following changes in the domestic and global economies. A third issue meriting special consideration was the social effects of competition policy. In inefficient industries, the introduction of competition policy could result in heavy unemployment. An optimal approach to tackling this problem would be to combine the implementation of competition policy on the one hand with policies to minimize its adverse effects on the other hand by way of creating new industries, promoting job mobility and implementing relief measures for the unemployed.¹⁵³

The view was also expressed that, in considering any requirement to apply competition policy in a non-discriminatory way, the "development caveat" should be borne in mind.¹⁵⁴ It was also stated that it was important to avoid reducing the discussion to one of the merits of two extreme positions; the situation facing Members was more complicated and a spectrum of possibilities existed for nurturing the existence of effective competition policies.¹⁵⁵

IV. OTHER ISSUES RAISED BY MEMBERS RELATING TO THE GROUP'S MANDATE TO STUDY THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY

In the meetings held on both 19-20 April and 10-11 June 1999, a number of other issues were raised by Members relating to the Group's mandate to study the interaction between trade and competition policy. Japan and Mexico provided written contributions on this matter (documents W/123 and W/136, respectively). Argentina; Australia; Canada; the Dominican Republic; Hong Kong, China; India; Japan; Korea; Malaysia; Mexico; Romania; Singapore; the United States; and the observer from the Russian Federation made oral comments or posed questions on this item. The observers from UNCTAD and the OECD provided updates on relevant activities of their organizations. In addition, the Group had before it an Overview of Members' National Competition Legislation (W/128) prepared by the Secretariat.

The view was expressed that further consideration was desirable in the Group of matters concerning the interaction between trade and competition policy.¹⁵⁶ In particular, it was said that, given the differences between the underlying assumptions and perspectives of competition policy and trade policy, it could be useful to consider the contrasting approaches of the two disciplines to several issues that had a bearing on both trade policy and competition policy and that had been the subject of some discussion in the meeting. Matters that merited consideration in this regard included the competition and trade policy perspectives in regard to export cartels, extraterritorial enforcement of competition laws and anti-dumping.¹⁵⁷ Furthermore, it was important to search for ways to address distortions of competition directly at their source, so as not to create further distortions of trade and competition.¹⁵⁸ Where appropriate, distortions could and should be addressed at source from the perspective of competition policy.

With regard to views that had been put forward previously by a Member regarding the purpose and effects of anti-dumping, the following views were expressed.¹⁵⁹ First, regardless of the original intention, the current WTO rules allowed anti-dumping measures to serve as protection for domestic industries. In particular, anti-dumping measures permitted under the current rules prohibited low-price sales which were completely legitimate under domestic competition law. Second, contrary to a

¹⁵³ M/9, paragraph 44.

¹⁵⁴ M/8, paragraph 89.

¹⁵⁵ M/8, paragraph 90.

¹⁵⁶ M/8, paragraphs 99, 101, 102, 103, 104, 105 and 106; M/9, paragraphs 56, 57 and 58.

¹⁵⁷ M/8, paragraph 103.

¹⁵⁸ M/8, paragraph 104.

¹⁵⁹ M/8, paragraph 98 and related comments in paragraphs 102, 103 and 104.

view which had been expressed in the course of the Group's discussion of anti-dumping in 1998, it could not be maintained that the main objective of the anti-dumping system was to protect domestic industries against exports by foreign competitors that had unfair advantages in their home markets, since there was no requirement for an anti-dumping authority to stop the existence of such unfair advantages or to identify a cause and effect relationship in this regard. Third, the potential problems in the home markets of exporting countries which were alleged to justify anti-dumping measures did not, in fact, justify such measures since they either could be addressed by other WTO rules or were matters that should not be addressed by trade rules. Clearly, international economic rules should not in any way allow the invocation of sanctions based on differences in national economic systems. Fourthly, while noting the existence of domestic political realities regarding anti-dumping in some countries, imperfections in the current WTO rules should not be used as an excuse for imposing anti-dumping measures, given the magnitude of the market-distortive effects of such measures. The point was also made that anti-dumping actions were often taken by countries with relatively closed markets against imports from countries with relatively open economies, such as the United States.¹⁶⁰

The view was expressed that certain principles of competition policy could contribute to the objectives of the WTO, since the fundamental goal was to improve the well-being of the populations of WTO Members through continuing liberalization and efforts to ensure the better functioning of market forces.¹⁶¹ In this context, further progress was desirable in the area of international cooperation relating to predatory pricing and price discrimination, as a means of refining the application of anti-dumping measures. The Agreement on the Implementation of Article VI of the GATT set up a series of disciplines which covered the fundamental concepts of transparency, national treatment and implied precepts or concepts which, in one way or another, guaranteed reciprocity in dealing with these types of matters among Member countries. A first objective of anti-dumping measures was to protect the national firm from undue displacement. A second objective, and this had to be consistent with the previous criterion, was to avoid undue displacement without affecting the functioning of other markets. This necessitated the making of allowances for the necessary adjustment of markets, which would require an assessment of the costs and benefits of possible interventions. To some extent, the costs and benefits were recognized in certain criteria which were used in anti-dumping legislation. From this, it might be inferred that the criteria specified permitted the assessment of the minimum costs that would be acceptable in order to achieve market adjustment which in the long term would be of benefit to the entire population. However, the definition of dumping raised problems in terms of its effective application under the criteria described. First of all, the concept of dumping, as it was reflected in the law, was based on price differentiation related to market power. However, the practice of price differentiation was difficult to fit into general concepts of protection of competition since it did not necessarily involve the undue displacement of economic agents. The practice of predatory pricing was included in the broader concept of price discrimination. The view was expressed that it would be important to specify these concepts clearly in the Agreement on Article VI, to provide a more rational and economically sound basis for the administration of anti-dumping measures. The concept of price discrimination should be defined in terms of competition theory, with reference to concepts of costs and market power. Similarly, an effort would be made to properly define the concept of predatory pricing, through specification of variables that would be considered and the application of relevant tests. A further element which merited consideration with reference to the Agreement on the Implementation of Article VI and which could help to refine the application of anti-dumping measures was that of injury. Rather than the mere displacement of competitors, this should be concerned with the displacement of efficient competitors. It should not be concerned with injury, which reflected medium- rather than long-term changes. Adverse changes in market structure should be part and parcel of the assessment of injury, as should be the consideration of net consumer welfare effects and the ability to abuse a dominant position. The concepts of the relevant market and market power as they were addressed under competition law and policy would also be relevant. The former, in particular, would facilitate assessment of the extent to which and

¹⁶⁰ M/8, paragraph 98.

¹⁶¹ M/9, paragraphs 54 and 55.

ways in which a particular practice was affecting the efficient functioning of markets.¹⁶² The view was also expressed that there was no reason why allegedly unfair price discrimination should be treated differently in the domestic and international settings.¹⁶³

In response to the above points, the view was expressed that the Working Group had been formed with the aim of exploring, in a pedagogical way, a set of issues with which the trading system had had very limited experience and understanding, primarily with respect to the structure, operation and implications of competition law and policy for trade in the broadest context. Its purpose was not to provide a focus for consideration of anti-dumping issues. The rules on anti-dumping had been negotiated at length and the question of any renegotiation was something that could not be taken up in this Group. Any suggestion to mutate anti-dumping rules into a different set of rules to govern predatory pricing was misplaced and misguided. It gave short shrift to the legitimate differences that existed between trade policy and competition policy objectives with respect to those issues. As had been discussed previously in the Group, anti-dumping and competition rules had different objectives – they were founded on different principles and they sought to address different problems. Article VI of the GATT had never had anything to do with the issue of predatory pricing, even in 1948 when it had been concluded. If the anti-dumping rules were eliminated in favour of competition laws or if they were modified to reflect competition principles, the problems which those rules had sought to remedy would go unaddressed. Anti-dumping rules were a remedial mechanism which was necessary to the maintenance of the multilateral trading system, and they also reflected a broad consensus among Members – developed and developing – which had been refined over many years. The overall understanding embodied in the WTO agreements had been achieved only because Members, particularly those with relatively open markets, had recourse to instruments such as anti-dumping laws. It was recognized that neither the GATT nor the Anti-Dumping Agreement specifically referred to the existence of anti-competitive practices in the home market as a prerequisite for defining dumping. For this reason, anti-dumping had been described merely as an indirect response to such practices, and not as a direct response or remedy for such practices. There was a forum in which WTO Members could take up these issues if it was judged that they were worthy of being taken up, and that forum was the Anti-Dumping Committee. That Committee was in a position to address alleged abuses of the anti-dumping rules, and, if deemed appropriate, to undertake a work programme on the implementation of relevant WTO agreements, more generally.¹⁶⁴ The view was also expressed that, if the Group should follow a broad approach to its work which included the subject of anti-dumping and other subjects that had an influence on the organization of markets, it would have to consider also the impact on trade and competition of matters as diverse as state assistance, subsidies, banking subsidies and subsidized interest rates. However, this did not appear to be the intended role of the Group.¹⁶⁵

The view was expressed that the concerns that had been raised regarding the impact of anti-dumping would have to be addressed adequately in the WTO, though not necessarily in the Working Group on the Interaction between Trade and Competition Policy.¹⁶⁶ It was also suggested that direct participation of competition authorities in the implementation of trade policy could contribute to minimizing the anti-competitive effects of trade measures.¹⁶⁷

The view was expressed that, alongside the work described in paragraph 88 above, a general agreement as to the application of competition legislation on a national level would make an important contribution to achieving the objectives of the WTO, since most countries had set themselves the goal of drawing up this kind of legislation and of applying it in a manner consistent with the principles of transparency and national treatment. National systems for the protection of

¹⁶² M/9, paragraph 55.

¹⁶³ M/8, paragraph 104.

¹⁶⁴ M/8, paragraph 100.

¹⁶⁵ M/9, paragraph 57.

¹⁶⁶ M/9, paragraphs 56 and 58.

¹⁶⁷ M/9, paragraph 61.

competition should be strengthened through international cooperation agreements, some of which had already been established regionally. Through such agreements, with better coordination and an attempt to achieve integration, the effectiveness of existing national legislation had been maximized and efforts had been made to eliminate restrictions affecting competition in markets, thereby ensuring the benefits of liberalization. Transparency, national treatment and most-favoured-nation treatment were essential principles for such cooperation. Implicit in the concept of most-favoured-nation treatment was the principle of reciprocity. It needed to be expressed in substantive ways in competition legislation. This by no means implied a need for full convergence of competition law among WTO Members. However, much remained to be done to promote reciprocity in the application of competition law and policy. Perhaps the most problematic aspect concerned waivers and exclusions from the application of national laws. Fundamental criteria to be used in competition legislation should be specified. For example, it would be possible to specify fundamental criteria used by Members in addressing vertical market restrictions and abuse of a dominant position. In addressing these practices, all countries, to some extent or another, made use of concepts such as the relevant market(s) and market power. Further exploration and analysis of these concepts in the international arena would contribute to promoting the use of common analytical tools across jurisdictions, which would promote reciprocity and the effective resolution of situations in which anti-competitive practices distorted trade or impeded access to markets.¹⁶⁸

¹⁶⁸ M/9, paragraph 54.

ANNEX 1

TEXT OF THE SINGAPORE MINISTERIAL DECLARATION (WT/MIN(96)/DEC), PARAGRAPH 20

(Adopted 13 December 1996)

20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.

CONTRIBUTIONS PROVIDED TO THE WORKING GROUP ON THE INTERACTION

BETWEEN TRADE AND COMPETITION POLICY IN 1999

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<i>Symbol</i>	<i>Member/other source</i>	<i>Where introduced</i>	<i>Topic</i>
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<i>(WT/WGTCP/W/-)</i>		<i>(Reference in Minutes)</i>	
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W/112	Turkey	M/6, paragraph 15	The Impact of State Monopolies, Exclusive Rights and Regulatory
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		(originally introduced as a	Policies on Competition and International Trade
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		non-paper)	
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W/113	Turkey	M/5, paragraph 10	Intellectual Property Rights and Competition
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		(originally introduced as a	
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		non-paper)	
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W/114	Secretariat	M/8, paragraph 2	Fundamental WTO Principles
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W/115	EC and member States	M/8, paragraphs 3-6	Fundamental WTO Principles & Competition Policy
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W/116	United States	M/8, paragraphs 44-50	International cooperation in competition law/policy
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W/117	Switzerland	M/8, paragraph 7	Fundamental WTO Principles & Competition Policy
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W/118	Hong Kong, China	M/8, paragraph 80	Contribution of Competition Policy to WTO Objectives
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W/119	Japan	M/8, paragraphs 10, 81-82	Fundamental WTO Principles & Competition Policy;
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			Contribution of Competition Policy to WTO Objectives
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W/120	Japan	M/8, paragraphs 8 and 9	Fundamental WTO Principles & Competition Policy
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W/121	Japan	M/8, paragraph 51	International cooperation in competition law/policy
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W/122	Japan	M/8, paragraphs 81-82	Contribution of Competition Policy to WTO Objectives
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W/123	Japan	M/8, paragraph 98	Response to US views on anti-dumping
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W/124	Korea	M/8, paragraphs 52-57	International cooperation in competition law/policy
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W/125	Australia	M/8, paragraph 58	International cooperation in competition law/policy
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W/126	Zimbabwe (for the	M/9, paragraph 23	International cooperation in competition law/policy
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	WTO African Group)		
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W/127	Secretariat	M/9, paragraph 5	Fundamental Principles of Competition Policy
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W/128 and	Secretariat	M/9, paragraph 53	Overview of Members' National Competition Legislation
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W/128/Rev.1			
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W/129	EC and member States	M/9, paragraph 22	International cooperation in competition law/policy
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W/130	EC and member States	M/9, paragraphs 40-42	Contribution of Competition Policy to WTO Objectives
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W/131	United States	M/9, paragraph 3	Fundamental WTO Principles & Competition Policy
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W/132	Romania	M/9, paragraph 24	International cooperation in competition law/policy
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W/133	Korea	M/9, paragraph 43	Contribution of Competition Policy to WTO Objectives
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W/134	Japan	M/9, paragraph 44	Contribution of Competition Policy to WTO Objectives
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W/135	Japan	M/9, paragraph 45	Contribution of Competition Policy to WTO Objectives
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W/136	Mexico	M/9, paragraphs 54-55	Anti-Dumping Measures and Competition
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W/137	Mauritius	M/10, paragraph 4	Interaction between Trade and Competition Policy: Small Economy
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			Perspectives
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W/138	South Africa	M/10, paragraph 5	Contribution of Competition Policy to WTO Objectives
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W/139	New Zealand	M/10, paragraph 6	APEC Principles to Enhance Competition and Regulatory Reform
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